Supreme Court, U.S.
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No. 97 1479 MAR 6 1998

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In The

Supreme Court of the United States

October Term, 1997

CARLOS DIAZ as personal representative of the estate of LAZARO DIAZ on behalf of the estate of LAZARO DIAZ and on behalf of JUAN DIAZ and YOLANDA DIAZ as survivors of LAZARO DIAZ,

Petitioner,

vs.

CCHC-GOLDEN GLADES, LTD., a limited partnership with COMMONWEALTH CONTINENTAL HEALTH CARE, INC., general partner, d/b/a GOLDEN GLADES REGIONAL MEDICAL CENTER, LTD.,

Respondents.

On Petition for Writ of Certiorari to the District Court of Appeal of Florida, Third District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. The District Court of Appeal of Florida, Third District, decided an important question of federal law that has not been, but should be, settled by this Court, to wit: Are the personal injury damages available to a claimant for a violation of the Emergency Medical Treatment and Active Labor Act, 42 U.S.C.A. § 1395dd(d)(2)(A) ("EMTALA") determined under a state's general wrongful death statute or under a state's medical negligence statute when the damages available thereunder differ or are mutually exclusive [under the Florida wrongful death statute adult survivors are entitled to pain and suffering damages when death is occasioned by any cause other than *"medical negligence"*]?

2. Given that the Florida wrongful death statute, sections 768.21(4) and (8), allow recovery of certain damages occasioned by non-medical negligent conduct, but exclude recovery of those same damages when occasioned by medical negligence: Did the Florida appellate court ignore congressional concerns and misapply federal precedent [recognizing that "EMTALA" is neither a malpractice nor a negligence statute] when it determined that an action brought under EMTALA incorporated "all the vagaries of" the Florida medical malpractice statute such that the EMTALA action before it failed for want of compensable damages?

LIST OF PARTIES

The petitioner, Carlos Diaz, as personal representative of the estate of Lazaro Diaz for and on behalf of the estate of Lazaro Diaz and on behalf of Juan Diaz and Yolando Diaz, lawful survivors under the Florida wrongful death statute, was the plaintiff in the trial court, was the appellant in the District Court of Appeal of Florida, Third District, and was the petitioner to the Florida Supreme Court on application for discretionary review. The respondent, CCHC-Golden Glades, Ltd., a limited partnership with Commonwealth Continental Health Care Inc., general partner, d/b/a Golden Glades Regional Medical Center, Ltd., was the defendant/appellee/respondent. In this petition the parties will be referred to as the petitioner and the respondent and, alternatively, by name. The reference "App." will refer to the rule-required appendix accompanying this petition. All emphasis has been supplied by counsel unless indicated to the contrary.

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REFERENCE TO THE OPINION TO BE REVIEWED

The opinion herein sought to be reviewed was rendered by the District Court of Appeal of Florida, Third District (App. 1a-2a), now reported, *see Diaz v. CCHC-Golden Glades, Ltd., etc.*, 696 So. 2d 1346 (Fla. App. 3d 1997) with Florida Supreme Court (discretionary), *review denied, Diaz v. CCHC-Golden Glades, Ltd., etc.*, 703 So. 2d 475 (Fla. 1997) (App. 5a-6a).

STATEMENT OF JURISDICTION

Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C.A. § 1257(a). Application for review to the Florida Supreme Court was denied on December 8, 1997 (App. 5a-6a) and no application for extension of time has herein been requested.

Petitioner requests this Court to exercise its discretion and to review the merits of this controversy as the opinion of the District Court of Appeal of Florida, Third District, has decided an important question of federal law that has not been, but should be, settled by this Court and has also decided an important federal question that conflicts with decisions rendered by several federal appeals courts.

STATUTORY PROVISIONS INVOLVED

The subject controversy involves the Emergency Medical Treatment and Active Labor Act ("EMTALA"), 42 U.S.C.A. § 1395dd, specifically, 42 U.S.C.A. § 1395dd(d)(2)(A), which provides:

* * *

(2) Civil enforcement

(A) Personal harm

> Any individual who suffers personal harm as a direct result of a participating hospital's violation of a requirement of this section may, in a civil action against the participating hospital, obtain those damages available for personal injury under the law of the State in which the hospital is located, and such equitable relief as is appropriate.

* * *

Also applicable herein is the Florida Wrongful Death Act, Sections 768.16-768.27, specifically Section 768.21 which as pertinent provides:

* * *

> All potential beneficiaries of a recovery for wrongful death, including the decedent's estate, shall be identified in the complaint, and their relationships to the decedent shall be alleged. Damages may be awarded as follows:

* * *

> (4) Each parent of a deceased minor child may also recover for mental pain and suffering from the date of injury. *Each parent of an adult child may also recover for mental pain and suffering if there are no other survivors.*

* * *

(8) The damages specified in subsection (3) shall not be recoverable by adult children and *the damages specified in subsection (4) shall not be recoverable by parents of an adult child with respect to claims for medical malpractice as defined by § 766.106(1).*

* * *

STATEMENT OF THE CASE AND FACTS — FEDERAL QUESTIONS RAISED, DETERMINED AND REVIEWED

Diaz appealed to the District Court of Appeal of Florida, Third District, from an adverse final summary judgment entered after the trial court determined that Diaz' cause of action against defendant, predicated upon an alleged violation of 42 U.S.C.A. § 1395dd ("EMTALA") *failed* for want of a compensable *damage* claim (R. 912, 915, 922, 923).

The EMTALA claim is found within the four corners of plaintiff's *fourth* amended complaint which complaint (with all extraneous matters herein deleted) alleges:

* * *

FACTS GIVING RISE TO CLAIM

* * *

7. At all times material LAZARO DIAZ, was profoundly retarded and developmentally disabled as defined by F.S. § 393.001(2).

8. At all times material, LAZARO DIAZ, was a resident of Landmark Learning Center.

9. On or about November 17, 1991, LAZARO DIAZ, suffered a fractured femur. On or about November 18, 1991, approximately eleven hours later, LAZARO DIAZ was transported to GOLDEN GLADES REGIONAL MEDICAL CENTER where he spent approximately two hours without treatment before he died due to loss of blood.

* * *

CLAIMS AGAINST GOLDEN GLADES REGIONAL MEDICAL CENTER

COUNT I — VIOLATION OF 42 U.S.C. § 1395dd

20. At all times material the defendant GOLDEN GLADES REGIONAL MEDICAL CENTER had a hospital emergency room department and did provide those ancillary services routinely available to an emergency room department, including a department of radiology.

21. That on or about November 18, 1991, Dorothy Radford accompanied LAZARO DIAZ to GOLDEN GLADES REGIONAL MEDICAL CENTER for the purpose of examination and treatment of a leg injury.

22. That at the time LAZARO DIAZ arrived at GOLDEN GLADES REGIONAL MEDICAL CENTER his condition constituted an emergency.

23. *Under the subject statute the defendant owed a duty to provide an appropriate medical screening examination within the capability of the emergency room department to determine whether or not a medical emergency exists and to provide within the staff and facilities available at the hospital treatment in order to stabilize the condition.*

24. Despite said duties *the hospital failed to do an appropriate screening and/or to stabilize LAZARO DIAZ as follows:*

(a) failed to do an appropriate screening examination as required by the hospital's own standards;

(b) failed to perform a timely x-ray as required by the hospital's own standards;

(c) failed to perform the screening examination on LAZARO DIAZ as would be provided to other GOLDEN GLADES patients under the same or similar circumstances;

(d) failed to properly stabilize LAZARO DIAZ despite knowledge that his condition was an emergency;

(e) failed to perform an examination of LAZARO DIAZ.

* * *

WRONGFUL DEATH DAMAGES

26. . . . As a direct and proximate cause of the death of LAZARO DIAZ the following damages have in the past and will in the future be incurred:

* * *

CLAIM OF JUAN DIAZ AND YOLANDA DIAZ

(a) mental pain and suffering as a result of the wrongful death of their child; (R. 124-137)

* * *

The respondent moved for partial summary judgment as to the above claim (R. 222-230). The respondent reasoned:

> A. Plaintiff is seeking damages under EMTALA which provides that the damages recoverable under a violation of the Act are:
>
> > . . . those damages available for personal injury under the law of the state in which the hospital is located . . . 42 U.S.C. Section 1395dd(d)(2)(A). (R. 225)
>
> B. The only "personal injury" damages available under the law of the state in which the hospital is located is Florida's Wrongful Death Act which, as pertinent, provides:
>
> > 768.21 damages . . . Damages may be awarded as follows:

* * *

> (4) . . . Each parent of an adult child may also recover for mental pain and suffering if there are no other survivors.

* * *

> (8) . . . The damages specified in subsection (4) shall not be recoverable by parents of an adult child with respect to claims for medical malpractice as defined by Section 766.106(1) . . . (R. 226)

C. LAZARO DIAZ was 32 years old at the time of his death.

D. Under Florida law a claim for medical malpractice, as defined under Section 766.106(1), Florida Statutes, is:

> a claim arising out of the rendering of, or the failure to render, medical care or services. (R. 226)

The respondent concluded, from the above reasoning, that since the petitioner sought damages under the Florida Wrongful Death Act for the mental pain and suffering of Juan Diaz and Yolanda Diaz as a result of the death of their adult child, Lazaro Diaz, and that since the claims of Juan Diaz and Yolanda Diaz fall squarely within the state statutory definition of a "claim for medical malpractice," no such *compensable* claims can exist under EMTALA (R. 226). Upon entry of final judgment Diaz appealed (R. 905, 906, 922, 923).

On appeal the District Court of Appeal of Florida, Third District, affirmed and in so doing stated:

> Primarily because of the legislative history set out by the Fourth Circuit in *Power v. Arlington Hospital Association*, 42 F.3d 851, 862-63 (4th Cir. 1994), reversing *Power v. Arlington Hospital*, 800 F. Supp. 1384 (E.D. Va. 1992) on this point, we are forced to the conclusion that the Emergency Medical Treatment and Labor Act (*EMTALA*), 42 U.S.C.A. § 1395dd(d)(2)(A)(1992), *incorporates all the vagaries of the state medical malpractice law in the determination of the damages recoverable in an action under the Act.* Accord *Reid v. Indianapolis Osteopathic Medical Hosp., Inc.*, 709 F. Supp. 853 (S.D. Ind. 1989); see also *Brooks v. Maryland Gen. Hosp., Inc.*, 996 F.2d 708, 714-15 (4th Cir. 1993).
>
> The unfortunate result in this case, as was correctly held below, is that under the thus applicable exception provided in section 768.21(8), Florida Statutes (1995), the present plaintiffs have no meaningful EMTALA (or Florida) claim whatever for the death of their adult child even if, as alleged, the defendant hospital violated the statute.

"Affirmed." *Diaz, supra*, 696 So. 2d at page 1347.

The petitioner's application to the Florida Supreme Court for discretionary review was denied (App. 5a-6a). This proceeding follows.

REASONS FOR GRANTING THE WRIT

A.

Under EMTALA, every hospital that has both a medicare provider agreement with the Secretary of Health and Human Services and an emergency room or department has a duty to:

> 1. provide to *anyone* presented for treatment an appropriate *medical screening* to determine *whether or not an emergency medical condition exists;*
>
> 2. *stabilize the condition* or, if medically warranted, to transfer the person to another facility if the benefits of transfer outweigh the risks; and
>
> 3. restrict the transfer of a person until that person's condition is stabilized.

See 42 U.S.C. §§ 1395dd(a)–(c). *See also Brooks v. Maryland General Hospital, Inc.*, 996 F.2d 708 (4th Cir. 1993) and *Correa v. Hospital San Francisco*, 69 F.3d 1184 (1st Cir. 1995).

B.

Congress enacted EMTALA in response to numerous concerns. While the legislative history of EMTALA evinces congressional concern for "patient dumping," the plain language of the statute affords protection to "any individual" regardless of ability to pay. 42 U.S.C.A. §§ 1395dd(a) and (b). As noted by the Court in *Lane v. Calhoun-Liberty County Hospital, Inc.*, 846 F. Supp. 1543 (N.D. Fla. 1994):

> The EMTALA does not require individuals to allege a hospital denied them a screening exam or

> improperly transferred them because the hospital feared they could not pay their bill . . . (citations omitted).

846 F. Supp. at page 1549.

Recovery under EMTALA is *not limited* to cases where hospitals discharge people based on financial considerations. The hospital's duties arise when "any person" appears for examination and treatment. *See Collins v. DePaul Hospital*, 963 F.2d 303 (10th Cir. 1992); *Cleland v. Bronson Health Care Group*, 917 F.2d 266 (6th Cir. 1990) and *Cooper v. Gulf Breeze Hospital, Inc.*, 839 F. Supp. 1538 (N.D. Fla. 1993). An EMTALA plaintiff does not have to plead a specific intent on the part of the hospital in order to state a claim under EMTALA. *Lane v. Calhoun-Liberty County Hospital, Inc.*, supra, 846 F. Supp. at page 1550.

C.

In order for a plaintiff to establish an EMTALA violation, a plaintiff must show:

* * *

> . . . (1) The hospital is a participating hospital, covered by EMTALA, that operates an emergency department (or an equivalent treatment facility); (2) *the patient arrived at the facility seeking treatment; and (3) the hospital either (a) did not afford the patient an appropriate screening in order to determine if she had an emergency medical condition,* or (b) bade farewell to the patient (whether by turning her away, discharging her, or improvidently transferring her) without first stabilizing the emergency medical condition . . .

Correa, supra, 69 F.3d at page 1190. As further noted by the Court in *Correa, supra:*

> *The statute* by its terms *directs a participating hospital to provide an appropriate screening* to all who come to its emergency department. Thus, to prove a violation of EMTALA'S screening provisions, *a plaintiff need not prove* that she *actually* suffered from an *emergency medical condition* when she first came through the portals of the defendant's facility; the failure appropriately to screen, by itself, is sufficient to ground liability as long as the other elements of the cause of action are met.

Correa, supra, 69 F.3d at page 1190.

As to the issue of "screening," the courts have uniformly held that *because a hospital's mere refusal to follow regular screening procedures contravenes EMTALA, nothing else as to that element need be alleged or proved because:*

> EMTALA does not create a cause of action for medical malpractice . . .

See Gatewood v. Washington Health Care Corp., 933 F.2d 1037 (D.C. Cir. 1991); *Correa v. Hospital San Francisco*, 69 F.3d at page 1189, *supra* and *Vickers v. Nash General Hospital, Inc.*, 78 F.3d 139 (4th Cir. 1996):

> The act thereby imposes a "limited duty on hospitals with emergency rooms to provide emergency care to all individuals who come there." (Citations omitted.) *The duty created by EMTALA is a "limited" one in a very critical sense: "EMTALA*

> *is not a substitute for state law malpractice actions, and was not intended to guarantee proper diagnosis or to provide a federal remedy for misdiagnosis or medical negligence.*" (Citation omitted.) We have frequently reaffirmed this limit on the Act's scope (citations omitted) . . . ("Virtually every decision addressing EMTALA has recognized that Congress did not intend for the Act to be a substitute for a state medical malpractice action.") . . . ("The Act was not designed to provide a federal remedy for misdiagnosis or general malpractice.") . . . ("EMTALA is no substitute for state law medical malpractice actions.") . . .

78 F.3d at page 142. As the court in *Vickers, supra*, further noted:

> *EMTALA* "is not intended to duplicate pre-existing legal protections, but rather to *create a new cause of action, generally unavailable under state tort law, for what amounts to failure to treat*" (Citations omitted).

78 F.3d at page 142.

D.

EMTALA, 42 U.S.C. § 1395dd(d)(2)(A), provides:

> *Any individual who suffers personal harm as a direct result of a participating hospital's violation of a requirement of this section may,* in a civil action against the participating hospital, obtain those damages available for personal injury under the law of the state in which the hospital is located, and such equitable relief as is appropriate.

It is now established that under EMTALA the "personal injury" therein envisioned includes "death" and the right of the decedent's relatives to seek damages for their own personal loss. *See Correa v. Hospital San Francisco*, 69 F.3d 1184, *supra*, and cases cited thereat. As EMTALA leaves to local law the issue of "those damages available for personal injury," perforce and applicable here is the Florida wrongful death statute, Section 768.21, which provides that (general tort) damages may be awarded as follows:

* * *

> (4) . . . Each parent of an adult child may also recover for mental pain and suffering if there are no other survivors . . .

* * *

> (8) . . . The damages specified in subsection (4) shall not be recoverable by parents of an adult child with respect to claims for *medical malpractice as defined by Section 766.106(1).*

Florida Statutes, Section 766.106(1), defines a claim for medical malpractice as "a claim arising out of the rendering of, or the failure to render, medical care or services." However, Section 766.102, Florida Statutes, mandates:

> (1) *In any action for recovery of damages based on the death* or personal injury *of any person in which it is alleged that such death or injury resulted from the negligence of a health care provider . . .* the *claimant shall have the burden of proving* by the greater weight of evidence *that the alleged actions of the health care provider represented a*

> *breach of the prevailing professional standard of care for that health care provider . . .*

Here, *unlike Power v. Arlington Hospital Association*, 42 F.3d 851 (4th Cir. 1994), upon which the Third District relied, recovery under the Florida medical malpractice statute *requires*, as a condition precedent to recovery, medical testimony establishing a departure from the requisite "standard of care." This requirement relates to the *remedy* available under the Florida medical malpractice statute. *EMTALA does not incorporate state court remedies.* Under EMTALA one can recover if there exists a violation of EMTALA. There exists no requirement that in order to establish a viable cause of action under EMTALA, one need present medical expertise establishing a "departure" from the requisite standard of care. In truth, EMTALA does not incorporate any (much less all) of the "vagaries of the Florida medical negligence statute." EMTALA directs that any individual who suffers personal harm as a direct result of a participating hospital's violation of a requirement of the pertinent section may obtain those damages "available for personal injury under the law of the state in which the hospital is located." Because EMTALA is neither a malpractice nor a negligence statute, the District Court of Appeal of Florida, Third District, clearly misapplied federal precedent and erroneously decided an important question of federal law in applying the medical negligence exception to the Florida wrongful death statute to an action premised upon EMTALA.

The petitioner would suggest to this Court the petitioner has neither pled nor contends, that the violations sued upon constitute medical malpractice. Further, and more important, EMTALA does not create a cause of action for medical malpractice. *See Correa v. Hospital of San Francisco, supra,* and cases cited thereat. As noted by the court in *Matter of Baby "K"*, 16 F.3d 590 (4th Cir. 1994):

> . . . The plain language of *EMTALA requires stabilizing treatment* for any individual who comes to a participating hospital, is diagnosed as having an emergency medical condition, and cannot be transferred. 42 U.S.C.A. Section 1395dd(b).

16 F.3d at page 596.

As noted by the court in *Repp v. Anadarko Mun. Hosp.*, 43 F.3d 519 (10th Cir. 1994), EMTALA is neither a malpractice nor a negligence statute. As further noted by the court in *Holcomb v. Monahan*, 30 F.3d 116 (11th Cir. 1994), EMTALA is not designed to redress a negligent diagnosis by the hospital. The court therein reminded no federal malpractice claims are created.

E.

Under Florida law, upon death, each parent of an adult child may recover for mental pain and suffering if there are no other survivors *except* with respect to claims for medical malpractice as defined by Section 766.106(1). EMTALA, however, does not create a federal claim for medical malpractice nor was it designed to. *Here, petitioner's cause of action arose from a violation of a federal statute which was enacted by Congress with the specific intent to prevent the very result which occurred.* The Florida appellate court's application to EMTALA of the "medical negligence" exception in the Florida wrongful death statute clearly ignores congressional concerns and allows Florida hospitals to "dump" patients without fear of EMTALA suits. As the court noted in *Matter of Baby "K"*, 16 F.3d at page 597, *supra:*

> . . . It is well settled that state action must give way to federal legislation where a valid 'act of congress,' fairly interpreted, is in *actual conflict* with

> the law of the state (citations omitted) and EMTALA provides that *state and local laws that directly conflict with the requirements of EMTALA are preempted.* 42 U.S.C.A. Section 1395dd(f).

16 F.3d at page 597.

The subject cause of action has its genesis in a congressional enactment and not in a state medical negligence statute. EMTALA did not create a federal medical malpractice statute nor will EMTALA itself allow for the interpretation advanced by the respondent, accepted by the trial court and embraced by the Third District. EMTALA specifically provides:

> Any individual who suffers *personal harm as a direct result of a participating hospital's violation of a requirement of this section may*, in a civil action against the participating hospital, obtain those damages available for personal injury under the law of the state in which the hospital is located, and such equitable relief as is appropriate.

42 U.S.C.A. § 1395dd(d)(2)(A). The "personal harm" in this case arose, if it arose at all, as a result of:

> . . . a participating hospital's violation of a requirement of this section . . .

The harm herein complained of did not arise as a consequence of "medical negligence."

Even assuming for a moment the invalidity, inaccuracy and/or legal incorrectness of the petitioner's above "conclusion" and the facts of this case *squarely fit within each statutory definition,* there would then exist a "collision" between the two (conflicting) provisions in their application *to* EMTALA. In that case the

exception (to the statute) must fail in that it incorporates into "the EMTALA remedy" a requirement that a claimant *prove* something not required under EMTALA, to wit: a departure from a medical "standard of care." The exception to the statute must fail as it is:

> . . . well settled that state action must give way to federal legislation where a valid "act of congress," fairly interpreted, is in actual conflict with the law of the state (citations omitted) and EMTALA provides that state and local laws that directly conflict with the requirements of EMTALA are preempted . . .

16 F.3d at page 597.

F.

The petitioner would suggest to this Court that to apply the "medical negligence" *exception* of the Florida wrongful death statute to an EMTALA created cause of action would defeat congressional concerns, would allow state court medical negligence precepts to engrain themselves upon EMTALA situations and would certainly deny to this petitioner (to these claimants) equal protection under the Federal Constitution in that persons similarly situated in other states would be allowed to maintain EMTALA actions and obtain damages for pain and suffering whereas this petitioner, on behalf of these claimants, would not.

Because there exists nothing in EMTALA to suggest that it "incorporates all the vagaries of the *state medical malpractice law* in the determination of the damages recoverable in an action under the Act," *Diaz, supra,* 696 So. 2d at page 1347, it is clear the Florida appellate court both misconstrued and

misapplied controlling federal precedent. Prima facie, the "personal harm" herein suffered arose as a direct result of a participating hospital's violation of a requirement of EMTALA. Such harm arose under a statute that has been judicially construed in the federal system to be neither a malpractice nor a negligence statute. Where, as here, the Florida wrongful death statute excludes certain damages occasioned as a consequence of medical negligence, *but allows the same damages to be recovered when they are sustained as a consequence of, conduct other than "medical negligence,"* it is clear that the result reached ignores congressional concerns. This Court should exercise its discretion and review the merits of this controversy.

CONCLUSION

Based upon the foregoing reasons and citations of authority, the petitioner respectfully urges this Honorable Court to exercise its discretion and to review the merits of the subject controversy. The petitioner would further request that this Court, after merits review, grant the subject petition, quash the opinion of the District Court of Appeal, Third District, and remand this cause with directions to reinstate petitioner's EMTALA cause of action.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT DATED JULY 23, 1997

Carlos DIAZ, as personal representative of the Estate of Lazaro Diaz on Behalf of the Estate of Lazaro Diaz and on Behalf of Juan Diaz and Yolanda Diaz, as survivors of Juan Diaz and Yolanda Diaz, as survivors of Lazaro Diaz,

Appellants,

v.

CCHC-GOLDEN GLADES, LTD., a limited partnership with Commonwealth Continental Health Care, Inc., general partner, d/b/a Golden Glades Regional Medical Center, Ltd.,

Appellee.

District Court of Appeal of Florida,
Third District.

July 23, 1997.

No. 96-467

Before SCHWARTZ, C.J., and COPE and LEVY, JJ.

SCHWARTZ, Chief Judge.

Primarily because of the legislative history set out by the Fourth Circuit in *Power v. Arlington Hospital Association,* 42 F.3d 851, 862–63 (4th Cir. 1994), reversing *Power v. Arlington Hospital,* 800 F.Supp. 1384 (E.D.Va. 1992) on this point, we

are forced to the conclusion that the Emergency Medical Treatment and Labor Act (EMTALA), 42 U.S.C.A. §1395dd(d)(2)(A)(1992),[1] incorporates all the vagaries of the state medical malpractice law in the determination of the damages recoverable in an action under the Act. Accord *Reid v. Indianapolis Osteopathic Medical Hosp., Inc.*, 709 F.Supp. 853 (S.D.Ind. 1989); see also *Brooks v. Maryland Gen. Hosp., Inc.*, 996 F.2d 708, 714–15 (4th Cir. 1993).

The unfortunate result in this case, as was correctly held below, is that under the thus applicable exception provided in section 768.21(8), Florida Statutes (1995),[2,3] the present plaintiffs have no meaningful EMTALA (or Florida) claim whatever for the death of their adult child even if, as alleged, the defendant hospital violated the statute.

Affirmed.

---

1. **(A) Personal harm**

Any individual who suffers personal harm as a direct result of a participating hospital's violation of a requirement of this section may, in a civil action against the participating hospital, obtain those damages available for personal injury under the law of the State in which the hospital is located, and such equitable relief as is appropriate.

2. (8) The damages specified in subsection (3) shall not be recoverable by adult children and the damages specified in subsection (4) shall not be recoverable by parents of an adult child with respect to claims for medical malpractice as defined by s.7666.106(1).

3. Because there is no contention that section 768.21(8) is itself invalid, cf. *University of Miami v. Echarte*, 618 So.2d 189 (Fla. 1993), *cert. denied*, 510 U.S. 915, 114 S.Ct. 304, 126 L. Ed.2d 252 (1993); *Smith v. Department of Ins.*, 507 So.2d 1080 (Fla. 1987); *Vildibill v. Johnson*, 492 So.2d 1047 (Fla. 1986), we note but do not pass upon that possibility.

APPENDIX B — FINAL JUDGMENT BY THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA DATED JANUARY 25, 1996

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO: 92-3615 CA 22

CARLOS DIAZ as Personal Representative of the Estate of LAZARO DIAZ and on behalf of JUAN DIAZ and YOLANDA DIAZ as survivors of LAZARO DIAZ,

Plaintiff,

vs.

STATE OF FLORIDA DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES; CCHC-GOLDEN GLADES, LTD. a limited partnership with COMMONWEALTH CONTINENTAL HEALTH CARE INC. general partner d/b/a GOLDEN GLADES REGIONAL MEDICAL CENTER, LTD.,

Defendants.

FINAL JUDGMENT FOR DEFENDANTS, CCHC-GOLDEN GLADES, LTD. A LIMITED PARTNERSHIP WITH COMMONWEALTH CONTINENTAL HEALTH CARE INC. general partner, d/b/a GOLDEN GLADES REGIONAL MEDICAL CENTER, LTD.

THIS CAUSE having come before the Court, and the Court having been advised that the Plaintiff has filed a Notice of Dropping Claim by which the claim of the Estate of Lazaro

Diaz for damages has been dropped, and being advised by the Plaintiff that the claim of JUAN DIAZ and YOLANDA DIAZ for funeral expenses incurred as a result of the death of LAZARO DIAZ is abandoned, and the Court finding that the liability claims brought by the Plaintiff against the Defendants, CCHC-GOLDEN GLADES, LTD. a limited partnership with COMMONWEALTH CONTINENTAL HEALTH CARE INC, general partner, d/b/a GOLDEN GLADES REGIONAL MEDICAL CENTER, LTD., fail for want of a compensable damage claim as a result of the partial summary judgment entered in favor of Golden Glades Regional Medical Center on October 10th, 1995,

IT IS ADJUDGED that Plaintiff, CARLOS DIAZ, as Personal Representative of the Estate of LAZARO DIAZ on behalf of the Estate of LAZARO DIAZ and on behalf of JUAN DIAZ and YOLANDA DIAZ as survivors of LAZARO DIAZ, take nothing by this action and that Defendants, CCHC-GOLDEN GLADES, LTD. a limited partnership with COMMONWEALTH CONTINENTAL HEALTH CARE INC, general partner, d/b/a GOLDEN GLADES REGIONAL MEDICAL CENTER, LTD., shall go hence without day.

DONE AND ORDERED in Chambers at Miami, Dade County, Florida this 25th day of January, 1996.

s/ Robert P. Kay
CIRCUIT COURT JUDGE

Copies furnished to:

Mark L. Stokes, Esquire
Jeffrey N. Schwartz, Esquire
A. Scott Lundeen, Esquire

APPENDIX C — DECISION OF THE SUPREME COURT OF FLORIDA DATED DECEMBER 8, 1997

SUPREME COURT OF FLORIDA

MONDAY, DECEMBER 8, 1997

CASE NO. 91,295

District Court of Appeal,
3rd District — No. 96-467

CARLOS DIAZ, etc.,

Petitioner,

v.

CCHC-GOLDEN GLADES, LTD., etc.,

Respondent.

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3 (b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330 (d).

OVERTON, SHAW, WELLS and ANSTEAD, JJ., and GRIMES, Senior Justice, concur.

Appendix C

A True Copy

TEST:
s/ Sid J. White
Clerk, Supreme Court

BH
cc: Hon. Louis J. Spallone, Clerk
Hon. Harvey Ruvin, Clerk
Hon. Robert P. Kaye, Judge

Mr. Arnold R. Ginsberg
Ms. J. Lorraine Brennan
Mr. Mark L. Stokes

Supreme Court, U.S.
FILED
APR 9 1998
CLERK

No. 97-1479

In The

Supreme Court of the United States

October Term, 1997

CARLOS DIAZ, as Personal Representative of the Estate of LAZARO DIAZ on behalf of the Estate of LAZARO DIAZ and on behalf of JUAN DIAZ and YOLANDA DIAZ as survivors of LAZARO DIAZ,

Petitioner,

v.

CCHC-GOLDEN GLADES, LTD., a Limited Partnership with COMMONWEALTH CONTINENTAL HEALTH CARE, INC., General Partner d/b/a GOLDEN GLADES REGIONAL MEDICAL CENTER, LTD.,

Respondents.

On Petition For Writ Of Certiorari To The District Court Of Appeal Of Florida, Third District

RESPONDENTS' BRIEF IN OPPOSITION

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18 pp

QUESTION PRESENTED

DOES THE EMERGENCY MEDICAL TREATMENT AND ACTIVE LABOR ACT, 42 U.S.C.A. § 1395dd, (EMTALA) INCORPORATE A STATE'S SPECIFIC LIMITATIONS FOR RECOVERY IN A WRONGFUL DEATH ACTION BASED UPON MEDICAL MALPRACTICE?

PARTIES TO THE PROCEEDING

The Petitioner, Carlos Diaz, as Personal Representative of the Estate of Lazaro Diaz, for and on behalf of the Estate of Lazaro Diaz and on behalf of Juan Diaz and Yolanda Diaz, was the Appellant in the District Court of Appeal of Florida, Third District, and was the Petitioner to the Florida Supreme Court on application for discretionary review.

The Respondents, CCHC-Golden Glades, Ltd., a Limited Partnership with Commonwealth Continental Health Care, Inc., General Partner, d/b/a Golden Glades Regional Medical Center, Ltd., were the Defendants in the trial court, the Appellees in the District Court of Appeal of Florida, Third District, and the Respondents in the Florida Supreme Court application for discretionary review. Commonwealth Continental Health Care, Inc.'s parent companies are OrNda Hospital Corporation, Tenet HealthSystem HealthCorp. and Tenet Healthcare Corporation.

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Florida Statutes §§ 766.106(1)(a).....1, 9

VA. CODE ANN. § 8.01-581.1 to 581.20 (Michie 1992 and Supp. 1993) MEDICAL MALPRACTICE ACT 5

OPINIONS BELOW

The petition accurately reflects the opinions below. Copies to Opinions below are located in Appendix to Petitioner's Writ of Certiorari.

JURISDICTIONAL STATEMENT

The decision rendered by the District Court of Appeal of Florida, Third District, is not in conflict with any Federal Decisions and is in full compliance with the directives and legislative intent of EMTALA regarding the availability of damages under the Act. In the absence of any conflict between the lower court decision and any federal decisions, no controversy exists and this Court's discretionary review is not invoked.

STATUTORY PROVISIONS INVOLVED

The petition accurately delineates that this controversy involves the EMERGENCY MEDICAL TREATMENT AND ACTIVE LABOR ACT (EMTALA) 42 U.S.C.A. § 1395dd, specifically 42 U.S.C.A. § 1395 dd(d)(2)(A), and the FLORIDA WRONGFUL DEATH ACT, §§ 768.16-27, specifically § 768.21(8). This controversy also involves Florida's statutory definition of "Claim for Medical Malpractice" as set forth in FLORIDA STATUTE § 766.106(1)(a), which provides: " 'Claim for medical malpractice' means a claim arising out of the rendering of, or the failure to render, medical care or services."

STATEMENT OF THE CASE AND FACTS

Supplementation and clarification of Petitioner's Statement of the Case and Facts is necessary for this Court's full understanding of the facts and record on appeal. The Petitioner (Plaintiff in the underlying action) filed his Fourth Amended Complaint on July 7, 1994. (R. 124-137). The claims against Respondents (Defendants below) consisted of: Count I – Violation of 42 U.S.C. § 1395dd (R. 131); Count II – Claim based on F.S. § 393.13 (R. 133) THE BILL OF RIGHTS OF PERSONS WHO ARE DEVELOPMENTALLY DISABLED and Count III – Medical Malpractice (R. 135).

On July 25, 1994, Respondent filed a Motion to Dismiss the Fourth Amended Complaint based upon three grounds:

1. The allegation of a violation of 42 U.S.C. § 1395dd failed to state a cause of action as the allegations presented a traditional state medical malpractice claim.

2. The claim based on Florida Statute § 393.13 failed to state a cause of action, specifically, as no private right of action existed under "The Bill of Rights of Persons Who are Developmentally Disabled."

3. The medical malpractice claim failed to state a cause of action.

Respondents argued that the Florida Wrongful Death Act specifically excluded a parent from recovering damages for mental pain and suffering due to the loss of an

adult child in a claim for medical malpractice, thus Petitioner's claim on behalf of the parents should be stricken. (R. 140-143).

The Court granted the Motion to Dismiss as to the medical malpractice claim. (R. 170-177). Respondents filed an Answer and Affirmative Defenses to Counts I and II of the Petitioner's Fourth Amended Complaint, but Petitioner never refiled Count III, the claim based on medical malpractice. (R. 191-198). Subsequently, Respondents filed a Motion seeking partial summary judgment as to the damages sought in Counts I and II of the Fourth Amended Complaint, more specifically, the parents' claim of "mental pain and suffering as a result of the wrongful death of their adult child." (R. 222-230). Respondents maintained that these damages were specifically excluded by the FLORIDA WRONGFUL DEATH ACT. Respondent also maintained there was no cognizable cause of action for the parents under F.S. § 393.13 under THE BILL OF RIGHTS OF PERSONS WHO ARE DEVELOPMENTALLY DISABLED. In the alternative, Respondents requested that the parents' claims for their mental pain and suffering be stricken. (R. 863-874).

On October 10, 1995, Partial Summary Judgment was entered in favor of the Respondents on the parents' claims of mental pain and suffering as a result of the death of their adult child. (R. 905-906). On January 25, 1996, a Final Judgment was entered for Respondents. In that Order, the Court included the fact that the Estate had dropped all claims and noted that the parents had abandoned their claim for funeral expenses. In light of the previous partial summary judgment, the Court found that

the parents' EMTALA claim failed for want of compensable damages.

ARGUMENT IN OPPOSITION TO PETITION

The Petition for Writ of Certiorari contains numerous and redundant recitations regarding the purpose of EMTALA and the fact that this is not a Federal substitute or replacement for a State medical malpractice action. This is then followed by nebulous and sweeping statements that the Florida Court of Appeal misapplied Federal precedent and erroneously decided an important question of Federal law. However, the Petition neither cites how such error was committed nor indicates the specific manner in which the Court misapplied the requirements of EMTALA. Finally, Petitioners advised that the lower Court's decision "conflicts with the decisions rendered by several Federal appeals courts" without identifying the decisions purportedly in conflict.

I. The Lower Court Decision Is In Accordance With Federal Precedent

Contrary to Petitioner's view, the underlying decision is in accordance with numerous Federal decisions examining the relationship between state-imposed recovery limits and EMTALA. The lower court's opinion is specifically grounded upon *Power v. Arlington Hospital Association*, 42 F.3d 851 (4th Cir. 1994). After an exhaustive review of Virginia statute and case law, the Fourth Circuit reversed a lower court decision and found that an EMTALA claim was a medical malpractice claim under

the Virginia Medical Malpractice Act. That Act defined "malpractice" as "any tort based on health care or professional services rendered or which should have been rendered, by a health care provider to a patient." VA. CODE ANN. § 8.01-581.1 (Michie Supp. 1993). Therefore, the EMTALA claim "fit[s] within the rubric of coverage of the malpractice cap," and damages were limited to a $1 million maximum pursuant to VA. CODE ANN. § 8.01-581.15 (Michie 1992). *Id* at 861.

While *Power* is the most exhaustive decision examining the relationship of statutory recovery limits and EMTALA's incorporation clause, it doesn't stand alone. In a case of first impression, the Court in *Reid v. Indianapolis Osteopathic Medical Hospital, Inc.*, 709 F. Supp. 853 (S.D. Ind. 1989) applied Indiana's statutory limit of recovery to an EMTALA claim, as follows:

> . . . [I]t is entirely reasonable to read the language of § 1395dd(d)(3)(A) as incorporating state law caps on medical malpractice damages: the Federal statute states that individual plaintiffs can only "obtain those damages available for personal injury under the law of the state," and in those states (such as Indiana) with restricted medical malpractice statutes, the amount of damages that would be "available" for a personal injury claim against the health care provider would be *only* those damages available under that medical malpractice statute itself. Thus the court finds that, although § 1395dd(d)(3)(A) does not incorporate Indiana's procedural limitation on medical malpractice claims, it does incorporate the state's substantive limitation on the maximum amount

> recoverable for personal injury from a health care provider.

Id. at 855-856 (emphasis in original).

In *Lane v. Calhoun-Liberty County Hospital Association, Inc.*, 846 F. Supp. 1543 (N.D. Fla. 1994), the court commented on the recovery rights of a surviving parent pursuant to the FLORIDA WRONGFUL DEATH ACT when read in conjunction with an EMTALA claim.

> . . . [T]he Court concludes Florida law permits plaintiff to recover damages for her own pain and suffering resulting from her son's death. The Hospital argues the Florida Wrongful Death Act only permits plaintiff to recover damages if her son was not survived by anyone. As plaintiff alleges [decedent] was survived by two minor children, the Hospital contends plaintiff may not recover damages.
>
> The Hospital would be correct if [decedent] was an "adult" at the time of his death. *See* Fla. Stat. Ann. § 768.21(4). The Florida Wrongful Death Act, however, permits the parents of the decedent to recover – without restriction – damages for their pain and suffering if the decedent was a "minor child" at the time of death.

Id. at 1553.

In an effort to address the identified medical malpractice "crisis," the Florida Legislature, unlike some of its sister states which adopted statutory damage caps, chose to address the situation by restricting those parties who could recover damages for wrongful death attributable to medical malpractice. Such restrictions are analogous to and should be entitled to the same credence as a

statutory cap when read in conjunction with EMTALA's incorporation clause as to available damages.

II. The Decision Below Is Consistent With Congressional Intent And EMTALA § 1395dd(d)(2)(A).

In the Federal cases which have reviewed the relationship between state statutory recovery restrictions and EMTALA, the study of the legislative intent has been a critical component to the decisions. Given its reliance upon *Power*, 42 F.3d 851 (4th Cir. 1994) the lower court decision followed both Congressional intent and federal precedent under EMTALA, by holding that an EMTALA claim fell within the medical malpractice exception of the Florida Wrongful Death Statute.

> . . . [W]hen Congress drafted § 1395dd(d)(3)(A), it was clearly aware of a growing concern in some States that excessive damage awards were fueling a medical malpractice "crisis." *See, e.g.*, House Report #99-241 (Part 3), at 6, 1986 U.S.Code Cong. and Admin. News at 727. As a result, a number of such States had recently enacted ceilings on the amount of damages that could be recovered from medical personnel – ceilings that Congress apparently wished to preserve through the incorporation clause of § 1395dd(d)(3)(A).

Reid v. Indianapolis Osteopathic Medical Hospital, 709 F. Supp. 853, 855 (S.D. Ind. 1989) (§ 1395dd(d)(3)(A) is the identical predecessor to § 1395dd(d)(2)(A) which was redesignated in the 1990 Amendments). In the original report from the Committee on the Judiciary, Report 99-241, Part 3, Congress' intent is expressed as follows:

> [T]he Committee is concerned that if penalties are too severe, some hospitals, particularly those

> located in rural or poor areas, may decide to close their emergency rooms entirely rather than risk the civil fines, damage awards, and, as to physicians, criminal penalties that might ensue.

EMTALA § 1395dd(d)(2)(A), expressly adopts state-imposed limitations on damages. *See Lane* at 1552; *Brooks v. Maryland General Hospital, Inc.*, 996 F.2d 708, 715 (4th Cir. 1993), *Power* at 861; and *Lee v. Alleghany Regional Hospital Corporation*, 778 F. Supp. 900 (W.D. Va. 1991). Federal appeals courts have recognized, that by enacting the incorporation clause, Congress was explicitly directing Federal courts to look to state law in the state where the hospital is located to determine the type and amount of damages available in EMTALA actions. *Power* at 860. *See also Lee* at 900; *Reid* at 855; and *Owens v. Nacogdoches County Hospital District*, 741 F. Supp. 1269 (E.D. Tex. 1990). The *Power* Court recognized that the disadvantage in such an approach was that damages available in EMTALA would vary from state to state; however, the court reasoned this result is unavoidable because it is inherent in § 1395dd(d)(2)(A)'s explicit direction that courts look to state law to determine what damages are available. *Power* at 863. That directive was seen as "an attempt on the part of Congress to balance the deterrence and compensatory goals of EMTALA with deference to

the ability of the states to determine what damages are appropriate in personal injury actions against hospitals." *Id.*

III. There Is No Conflict Between EMTALA And Florida's Wrongful Death Act.

The recovery limit for mental pain and suffering of parents of an adult child with respect to claims for medical malpractice under Florida's Wrongful Death Act is consistent with the goals of EMTALA. Congress explicitly deferred to the particular states to determine what damages were appropriate under EMTALA. No evidence has been presented by the Petitioner of a direct conflict between the Federal and Florida Statutes. Petitioners' preemption analysis is inappropriate when, as with EMTALA, the Federal statute expressly incorporates state law. *Power* at 864. The Petitioner incorrectly implies that the Third District Court adopted and applied to EMTALA all of Florida's procedural and proof requirements. This misconstrues the lower Court's decision. The opinion evidences a clear understanding of the restrictions which apply under an EMTALA claim by applying the restrictions only in "the determination of the *damages* recoverable in an action under [EMTALA]." This counters Petitioners' representation that the Court adopted "all the vagaries of the Florida Medical Negligence Statute." (Petition at 14).

The Florida Supreme Court has recognized and preserved the statutory language defining a claim for medical malpractice in Florida Statute § 766.106(1)(a) as: "Claim for medical malpractice means a claim arising out

of the rendering of, or the failure to render, medical care or services." *J.B. v. Sacred Heart Hosp. of Pensacola*, 635 So. 2d 945, 949 (Fla. 1994).

As in Virginia, the Florida courts have chosen to give a broad construction to this definition:

> Even though Chapter 766 uses the terms "negligence" or "medical negligence" in several of its provisions, we do not believe that the legislature intended to limit coverage of the statutory scheme to only those actions framed in terms of negligence. It seems to us that the intent expressed in the text is to extend the statute whenever the medical judgment of the provider is being challenged.

Paulk v. National Medical Enterprises, Inc., 679 So. 2d 1289, 1292 n.3 (Fla. 4th DCA 1996). *See also, Tunner v. Foss*, 655 So.2d 1151, 1152 (Fla. 5th DCA 1995), rev. den., 663 So.2d 63 (Fla. 1995) (physician's alleged refusal to refer patient to a specialist based upon economic self-interest fell within the umbrella of the medical malpractice statute).

Without concern for negligence theories or otherwise necessary burdens of proof, the lower court recognized Florida's broad interpretation and definition of "medical malpractice" and found that Petitioners' EMTALA claim fell within those parameters.

FLORIDA'S WRONGFUL DEATH ACT, which imposes specific limitations on damages has been found constitutional and bears a rational relationship to the legitimate state interest of limiting increases in medical insurance costs. *Stewart v. I.B. Price, M.D.*, 704 So. 2d 594 (Fla. 1st DCA 1997). The constitutionality of the FLORIDA'S WRONGFUL DEATH ACT was recently upheld by the Florida Appellate

Court in the case of *Mizrahi v. North Miami Medical Center, Ltd.*, 23 Fla. L. Weekly D321 (Fla. 3rd DCA, Jan. 28, 1998).

Respondents submit to this Court that failure to apply the exclusion under Florida's Wrongful Death Act in an EMTALA action would result in the abandonment of state medical malpractice claims in favor of pursuing EMTALA claims in order to avoid the effect of the exclusion. This would clearly contravene Congress' intention that EMTALA not be used as a surrogate for traditional state claims of medical malpractice. *See Vickers v. Nash General Hospital, Inc.*, 78 F.3d 139, 141 (4th Cir. 1996).

CONCLUSION

The decision below has not defeated Petitioner's claim under EMTALA; it has merely limited the elements of damages recoverable. This is both consistent with Congressional intent and the plain language of EMTALA. Thus, in the decision below, the Court correctly applied the medical malpractice exception provided in § 768.21(8), Florida Statutes (1995).

For the reasons given above and based upon the citations of authority herein, it is respectfully submitted that this Court's discretionary jurisdiction should not be invoked and the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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